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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

ASARCO INCORPORATED,
Petitioner,

v.

LOUISIANA-PACIFIC CORPORATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988) ("CERCLA") imposes liability on persons "who ... arrange[] ... for disposal ... of hazardous substances ...." 42 U.S.C. § 9607(a)(3). The questions presented are:

1. Whether wastes that have been excluded from regulation as CERCLA "hazardous substances" under section 101(14)(C), 42 U.S.C. § 9601(14)(C), because they are generated in large volumes but pose low environmental hazards ("Bevill wastes"), may nonetheless be regulated as CERCLA "hazardous substances" under the remaining subparts of section 101(14) because of their hazardous constituents, where it is demonstrated that such a construction of section 101(14) nullifies the subpart (C) exclusion for Bevill wastes altogether.

2. Whether manufacturers who recycle industrial by-products by selling them in good faith to other parties for productive use can be found liable under CERCLA for "waste disposal," where those by-products turn out to be defective for their intended use.

PARTIES TO THE PROCEEDING

B & L Trucking and Construction Co., Respondent
Cascade Timber Co., Respondent
Eagle Trucking, Inc., Respondent
Executive Bark, Inc., Respondent
Industrial Mineral Products, Inc., Respondent
Louisiana-Pacific Corporation, Respondent
Murray Pacific Corp., Respondent
Port of Tacoma, Respondent
Portac, Inc., Respondent
Wasser & Winters Co., Respondent
Willaim B. Fjetland, Respondent

RULE 29.1 LISTING

Pursuant to Rule 29.1, petitioners disclose the following subsidiaries and affiliates of petitioner ASARCO Incorporated, as well as ASARCO Incorporated, have issued shares to the public:

Asarco Australia Limited
Grauer & Weil
Meltex
Grupo Mexico, S.A. de C.V.
M.I.M. Holdings Limited
Minto Exploration Ltd.
Neptune Mining Company

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner ASARCO Incorporated ("Asarco") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The findings of fact and conclusions of law of the United States District Court for the Western District of Washington are unreported, and are reprinted in Appendix A of the separately bound Appendix to this Petition ("Pet. App.") at A-1 through A-16. The United States Court of Appeals for the Ninth Circuit issued an opinion in this matter on September 23, 1993. Following a timely petition for

rehearing with suggestion for rehearing *en banc*, the court amended that opinion on January 13, 1994. Following a second petition for rehearing with suggestion for rehearing *en banc*, the court withdrew its January 13, 1994 amended opinion and filed a new opinion on April 28, 1994 ("Opinion"). Following a third and final petition for rehearing with suggestion for rehearing *en banc*, the court amended its Opinion on August 30, 1994. That amended Opinion is reported at 24 F.3d 1565 and reprinted in Appendix B to this Petition at B-1 through B-39.

JURISDICTION

The Ninth Circuit's judgment and Opinion were rendered on April 28, 1994. By Order dated August 29, 1994, the Ninth Circuit denied Asarco's timely petition for rehearing with suggestion for rehearing *en banc*. A copy of that Order is reprinted in Appendix C to this Petition at C-1 through C-2. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Principally at issue here are certain provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 - 9675 (1988) ("CERCLA"), and related provisions of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 - 6992k ("RCRA") (amending the Solid Waste Disposal Act of 1965).

A. CERCLA[1]

DEFINITIONS

Section 101. For purpose of this subchapter-

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, *(C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress)*, (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

(29) The terms "disposal," "hazardous waste," and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C.A. § 6903].

42 U.S.C. § 9601(14) and (29) (emphasis added).

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[1]All relevant provisions of CERCLA are reprinted in Appendix D to this Petition at D-1 through D-13.

LIABILITY

Section 107(a). Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-

(3) any person who by contract, agreement, or otherwise arranged for disposal ... of hazardous substances ... shall be liable for -

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

42 U.S.C. § 9607(a)(3)(B).

B. RCRA[2]

DEFINITIONS

Section 1004. As used in this chapter:

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(27) The term "solid waste" means any garbage, refuse, ... and *other discarded material* ... .

42 U.S.C. § 6903(3) and (27) (emphasis added).

IDENTIFICATION AND LISTING
OF HAZARDOUS WASTE

Section 3001(b)(3)(A). Notwithstanding the provisions of paragraph (1) of this subsection, each waste listed below shall ... be subject only to regulation under other applicable provisions of Federal or State law in lieu

---

[2]All relevant provisions of RCRA are reprinted in Appendix E to this Petition at E-1 through E-24.

> of this subchapter until at least six months after the date of submission of the applicable study required to be conducted ... and after promulgation of regulations in accordance with subparagraph (C) of this paragraph:
>
> (ii) *Solid waste from the extraction, beneficiation, and processing of ores and minerals* ... .

42 U.S.C. § 6921(b)(3)(A) (emphasis added).

STATEMENT OF THE CASE

A. Factual Summary.

Petitioner Asarco owns and, until 1985, operated a copper smelter in Tacoma, Washington. Copper smelting necessarily produces a by-product called "slag" -- the residual ore that is separated from the molten copper in the smelter reverberatory furnaces. After cooling, slag is a dense, heavy, rock-like material consisting primarily of iron and silicate, as well as small levels of arsenic, copper, lead, and zinc.

Before 1973, Asarco sold approximately one-quarter of its slag for a variety of commercial applications and, pursuant to an agreement with the Metropolitan Park District of Tacoma, placed the remainder of the slag in Commencement Bay as fill for a breakwater. In 1973, Asarco, with strong encouragement from the Washington Department of Ecology ("WDOE"), began to expand its commercial slag sales. Asarco entered into an exclusive distributorship contract with Black Knight, Inc., which contracted to purchase all of Asarco's slag, and leased a portion of the property at Asarco's Tacoma smelter to process the slag for resale.

Black Knight continued to sell slag to Asarco's previous customers, but also began promoting slag for use as ground-stabilizing ballast on logyards. For eight years, respondent logyards purchased large quantities of slag, instead of competing products like gravel, because slag functioned exceedingly well in this application; it was durable, supported the weight of the logs and the heavy equipment used to move

them, and "keyed" together to form a firmer foundation than gravel, while still providing good drainage.

In late 1980, the United States Environmental Protection Agency ("EPA") found elevated concentrations of heavy metals in a sample of surface runoff water from one of the logyards, and relayed the information to the WDOE. Ultimately, it was discovered that complex, unanticipated interactions among physical and chemical forces operating in the logyard environment had caused the slag to leach its heavy metal constituents, contaminating respondents' properties. In 1986, the WDOE issued the first of a series of orders concerning remediation of the sites.

Thereafter, the parties filed suit against one another in United States District Court for the Western District of Washington, seeking recovery for remediation costs under CERCLA, and also asserting state statutory and common law causes of action.[3]

B. Proceedings Below.

CERCLA section 107(a)(3) imposes liability on persons "who ... arrange[] ... for disposal ... of hazardous substances ...." 42 U.S.C. § 9607(a)(3). CERCLA section 101(14) defines "hazardous substance" by incorporating in subparts (A) through (F) various substances that have been designated for regulation under other specified environmental statutes. 42 U.S.C. § 9601(14). Section 101(14)(C) provides that CERCLA "hazardous substances" include hazardous wastes that have been designated as such in RCRA, "*(but not including any waste the regulation of which under [RCRA] has been suspended by Act of Congress).*" 42 U.S.C. § 9601(14)(C) (emphasis added). Subpart (C) thus excludes

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[3]Jurisdiction in the district court was invoked under 42 U.S.C. § 9613(b), which confers exclusive original jurisdiction in the United States district courts over all CERCLA controversies.

from the definition of CERCLA "hazardous substances" certain wastes (known as "Bevill wastes") that were excluded from regulation as RCRA "hazardous wastes" because they are generated in large volumes but pose low environmental hazards.

At trial,[4] Asarco argued that it was not liable under CERCLA (1) because slag, a Bevill waste, is exempt from regulation as a CERCLA "hazardous substance" under section 101(14)(C), and (2) because in selling slag to the logyards for use as ground-stabilizing ballast, Asarco had not "arranged for disposal" of slag within the meaning of section 107(a)(3), 42 U.S.C. § 9607(a)(3).

The district court rejected these arguments and imposed CERCLA liability on Asarco. The court held that the CERCLA exclusion for Bevill wastes was limited to subpart (C) of section 101(14), and that slag, which contained and had leached its heavy metal constituents, qualified as a "hazardous substance" under subsections (A), (B), and (D) of section 101(14). In so holding, the court rejected Asarco's argument that such a construction of section 101(14) nullifies the exclusion for Bevill wastes set forth in subpart (C), since it was undisputed on the record that all Bevill wastes contain and will release constituent elements that qualify as "hazardous substances" under the remaining subparts of section 101(14).

The district court also found that Asarco's sale of slag constituted a "waste disposal" within the meaning of section 107(a)(3), 42 U.S.C. § 9607(a)(3), notwithstanding that the jury had previously found by special verdict that slag was a "product" for purposes of the Washington Products Liability Act ("WPLA"), R.C.W. ch. 7.72, possessing "intrinsic value"

---

[4]The CERCLA claims were tried to the court, Pet. App. at A-2, while all remaining state law claims were tried to a jury.

and having been "produced for introduction into trade or commerce." The district court rejected Asarco's argument that the jury's "product" verdict (and subsequent imposition of liability under WPLA) precluded the court, under the Seventh Amendment to the United States Constitution, U.S. Const. amend. VII, from finding that Asarco had "disposed" of a "solid waste" as those terms are specifically defined in CERCLA, holding simply that "this so-called product was so bad that it, in my view, was never really a legitimate product." Pet. App. at A-14.

The Ninth Circuit affirmed both of the district court's CERCLA liability rulings. With respect to the Bevill waste issue, the Ninth Circuit found that "the plain language and structure" of section 101(14) make clear that "the specific exception for slag in subsection (C) applies only to that subsection." Pet. App. at B-18. The Ninth Circuit dismissed Asarco's argument that such a construction would nullify the subpart (C) exclusion for Bevill wastes, observing simply that "Asarco's argument is based on a false premise. It assumes that Congress meant for the statute to say something other than what it plainly says." Pet App. at B-20. Alternatively, the court deferred to the construction advanced by the EPA, which had "interpreted section 9601(14) to mean that the Bevill Amendment exception in subsection (C) refers only to that subsection." Pet. App. at B-20.

With respect to the "waste disposal" issue, the Ninth Circuit affirmed the district court's holding, though on different grounds. The Ninth Circuit held that Asarco's sale of slag to the logyards simultaneously could constitute the sale of a defective "product" for purposes of state products liability law, and the "disposal" of a "solid waste" for CERCLA purposes, because slag was "at best a by-product" with "nominal commercial value." Pet. App. at B-22.

REASONS FOR GRANTING THE PETITION

This Petition presents two questions of substantial importance continuously arising under CERCLA, which have never been addressed by this Court but have been the subject of extensive and inconsistent treatment by the Circuit Courts of Appeals.[5]

I. The CERCLA Exclusion For Bevill Wastes

The Ninth Circuit's construction of section 101(14) nullifies Congress' express exclusion of Bevill wastes from CERCLA regulation under subpart (C), and thereby overturns the carefully-balanced scheme of environmental regulation that Congress adopted. It was undisputed on the record below that all Bevill wastes contain constituent elements that meet the definition of "hazardous substance" under the remaining subparts of section 101(14). Thus, if the Ninth Circuit's construction of section 101(14) is accepted, and the CERCLA exclusion for Bevill wastes limited to subpart (C), that subpart is deprived of all meaning.

The Ninth Circuit's reliance on the statute's purported "plain language and structure," notwithstanding the clear nullification of subpart (C) that its construction effects, cannot be reconciled with prior decisions of this Court governing application of the "plain meaning" doctrine, and directly conflicts with the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Eagle-Picher*

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[5]This Court has issued only three opinions dealing with CERCLA, none of which involved the critical liability issues addressed here. *Key Tronic Corp. v. United States*, __ U.S. __, 114 S. Ct. 1960 (1994) (attorneys' fees are not recoverable under CERCLA); *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989) (states may be sued for money damages under CERCLA); *Exxon v. Hunt*, 475 U.S. 355 (1985) (CERCLA pre-empts state tax fund designed to compensate for expenses reimbursed by Superfund).

Indus., Inc. v. United States EPA, 759 F.2d 922 (D.C. Cir. 1985). Given such nullification, the court was obligated but failed to consider the statute's legislative history, which unambiguously confirms Congress' understanding that Bevill wastes contain and can leach hazardous constituents, and its intention nonetheless to exclude Bevill wastes from CERCLA regulation. Because section 101(14) is fairly susceptible to an interpretation that gives effect to subpart (C), and that is unambiguously reflected in the legislative history, the Ninth Circuit should have adopted that construction.

The Ninth Circuit's decision, alternatively, to defer to the EPA's construction conflicts with prior decisions of this Court governing the circumstances under which such deference is appropriate. Since Congress' intention to exclude Bevill wastes from CERCLA regulation is clear from the legislative history, the Ninth Circuit erred in deferring to the EPA's contrary construction. Furthermore, the EPA's now-professed construction of section 101(14) directly contradicts the view the EPA expressed to Congress immediately following CERCLA's passage.

The question presented -- whether Congress intended that Bevill wastes be excluded from regulation as CERCLA "hazardous substances" -- is an important one. The Bevill Amendment was central to the cost-benefit balance of environmental regulation that Congress struck in CERCLA, reflecting Congress' concern that the costs of such regulation not be imposed on the mining, utility and cement industries until the need for such regulation was established. The Ninth Circuit's decision, if allowed to stand, would rework the compromise that Congress reached, and adversely affect a significant portion of American commerce.

A. The Ninth Circuit's Construction Cannot Be Said To Follow From The Statute's "Plain Meaning" Because That Construction Would Nullify One Of The Statute's Essential Provisions.

This Court repeatedly has emphasized that "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *accord United States v. Nordic Village, Inc.*, ___U.S. ___, 112 S. Ct. 1011, 1015 (1992); *United States v. Menasche*, 348 U.S. 528, 537 (1955). The Ninth Circuit declined to address this cardinal principle of statutory construction, dismissing its application here as "based on a false premise. It assumes that Congress meant for the statute to say something other than what it plainly says." Pet. App. at B-20.

This analysis is completely circular. If the Ninth Circuit's construction would nullify a part of the statute, then that construction cannot be deemed to follow from the statute's "plain meaning." *United States v. Bryan*, 339 U.S. 323, 338 (1950); *United States v. Brown*, 333 U.S. 18, 26-27 (1948). Indeed, evidence of such nullification is offered precisely to show that the statute cannot have the "plain meaning" that the court's construction would ascribe to it, and that an alternative reading must be considered. *See Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116 (1985); *cf. Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").

In such circumstances, this Court historically "has looked beyond the words" to "other evidence of congressional intent." *United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1940); *accord Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989). If such evidence demonstrates that Congress had some purpose in mind other than that which would result from a literal reading of the

statute's text, then a departure from the "plain meaning" may be justified. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989) (Scalia, J., concurring).

The legislative history indisputably demonstrates that Congress intended to exclude Bevill wastes altogether from regulation as CERCLA "hazardous substances," notwithstanding their hazardous constituents. Since section 101(14) is fairly susceptible to a construction that gives effect to Congress' intention,[6] as reflected in the legislative history,

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[6]The Ninth Circuit relied principally on the fact that the CERCLA exclusion for Bevill wastes was placed within subpart (C), and not, like the petroleum exclusion, at the end of section 101(14). Pet. App. at B-18. However, such placement is rationally explained by the structure and history of section 101(14) itself. First, RCRA "hazardous wastes" are designated for CERCLA regulation in subpart (C); not surprisingly, that is also where Congress incorporated in CERCLA the RCRA *exclusion* for Bevill wastes. *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1539 (E.D. Cal. 1992). Second, there was no comparable exclusion for petroleum products under any of the pre-existing environmental statutes whose definitions of "hazardous" or "toxic" substances are incorporated in section 101(14). Thus, unlike the Bevill waste exclusion, the petroleum exclusion was particularly drafted for section 101(14). Third, the differences in placement are attributable to the fact that the petroleum exclusion emanated from a separate bill, and was subsequently merged into the legislative draft of section 101(14). Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Superfund Act of 1980*, 8 Colum. J. Envtl. L. 1, 3-10 (1982). Finally, mere placement of the CERCLA exclusion for Bevill wastes need not, by itself, be given conclusive effect. *See Young v. Community Nutrition Inst.*, 476 U.S. 974, 980-81 (1986).

that construction should have been adopted. *Nordic Village*, 112 S. Ct. at 1015; *Oceanic Contractors*, 458 U.S. at 575.

B. The Ninth Circuit's Decision Conflicts With The D.C. Circuit's Opinion In *Eagle-Picher*.

The Ninth Circuit's construction of section 101(14) purports to follow the D.C. Circuit's decision in *Eagle-Picher Indus., Inc. v. United States EPA*, 759 F.2d 922 (D.C. Cir. 1985). While the two decisions appear facially consistent they in fact conflict, because as the D.C. Circuit recognized, the "plain meaning" doctrine must yield if, on the record presented, its application would nullify a statutory provision.

In *Eagle-Picher*, the D.C. Circuit, like the Ninth Circuit, purported to rely on the "plain meaning of the entire statutory provision" in determining that the CERCLA exclusion for Bevill wastes was limited to subpart (C). *Id.* at 927. In reaching its conclusion, the court acknowledged that the Senate Report, which accompanied the legislative draft of section 101(14), *infra* at 16-17, unambiguously reflects Congress' intention to exclude Bevill wastes altogether from the definition of CERCLA "hazardous substances," notwithstanding their hazardous constituents:

> It is beyond reasonable debate that the language of the Senate Report is *clear*, and that the import of that language is that the exception set forth in subparagraph (C) extends, as it were, throughout *all* of section 101(14).

Id. at 928 (emphasis added). Yet, the court found that the language of section 101(14) was equally clear. Given a conflict between the "plain meaning" of the statute on the one hand, and the legislative history on the other, the court concluded that "the statute must control," *id.* at 929, and "the exclusionary exception should be limited to subparagraph (C)." *Id.* at 928.

Critically, the court recognized that:

> [i]f there were very clear legislative history indicating that Congress had an intent contrary to that expressed in the statute, *and* particularly *if application of the language would lead to an irrational result that Congress could not have intended, courts might well be justified in departing from the clear language and structure of the statute.*

Id. at 929 (emphasis in original; footnote omitted). On the record presented, however, the D.C. Circuit found that petitioners had "cited nothing ... demonstrating that all or virtually all mining wastes and fly ash have constituents which are 'hazardous substances.' We have nothing more than petitioners' bare assertions on this point." *Id.* at 928.

In contrast to the petitioners in *Eagle-Picher*, Asarco made just such a showing here. At trial, Asarco introduced testimony from Dr. Twidwell, a metallurgical engineer specializing in the treatment of industrial waste materials. In a seventeen-page affidavit, Dr. Twidwell concluded that "all or virtually all" Bevill wastes contain constituent elements that qualify as "hazardous substances" under the remaining subparts of section 101(14); such elements are simply ubiquitous in the earth's crust, from which Bevill materials are derived. This conclusion was undisputed, either in the trial court or on appeal.

In view of this showing, which establishes that the regulatory exclusion for Bevill wastes would be nullified if limited to subpart (C), the D.C. Circuit clearly would have reached a different result had it been presented with this record. Review by this Court is necessary to resolve the conflict in the treatment accorded this issue by the Ninth and D.C. Circuits, which is far too important to turn on the fortuity of where the issue arises.

C. The Legislative History Unambiguously Confirms Congress' Intention To Exclude Bevill Wastes From CERCLA Regulation Notwithstanding Their Hazardous Constituents.

On October 21, 1980, Congress enacted the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (1980), which included the Bevill Amendment.[7] The Bevill Amendment suspended from regulation as RCRA "hazardous wastes" all "[s]olid waste from the extraction, beneficiation, and processing of ores and minerals" (which includes copper smelting slag), as well as cement kiln dust, utility fly and bottom ashes, and petroleum drilling fluids. 42 U.S.C. § 6921(b)(2)(A), (b)(3)(A)(i)-(iii). The EPA was directed to study any adverse health and environmental effects from these wastes, to submit its report to Congress by October 21, 1983, 42 U.S.C. § 6982(p), and within six months of that report, either to "determine to promulgate regulations" governing these wastes, or to "determine that such regulations are unwarranted." 42 U.S.C. § 6921(b)(3)(C); *see also Solite Corp. v. United States EPA*, 952 F.2d 473, 478 (D.C. Cir. 1991).[8]

At the same time Congress was incorporating the Bevill Amendment into RCRA, it was drafting the final version of

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[7]The Bevill Amendment amended RCRA, which was itself an amendment to the Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, 79 Stat. 997 (1965), *as amended by* Pub. L. No. 91-512, 84 Stat. 1288 (1976).

[8]RCRA subtitle C regulates the treatment, storage and disposal of "hazardous wastes." RCRA subtitle D regulates "non-hazardous" solid wastes, and provides less stringent treatment and disposal requirements than subtitle C. Bevill wastes excluded from regulation as "hazardous wastes" under RCRA subtitle C remain subject to regulation as "non-hazardous" solid wastes under RCRA subtitle D.

the "Superfund" toxic and hazardous waste cleanup bill that was to become CERCLA. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Superfund Act of 1980*, 8 Colum. J. Envtl. L. 1 (1982) ("*A Legislative History*"). There were three bills that contributed provisions to the legislation as finally enacted: two House bills, H.R. 7020 and H.R. 85, and one Senate bill, S. 1480. *A Legislative History* at 2. S. 1480 emerged from the Senate Committee on Environment and Public Works ("Senate Committee") and contained what was to become CERCLA's "hazardous substance" definition. I Environmental Law Institute, *Superfund: A Legislative History*, xvii (1982) ("*Superfund*").

In June, 1980, the Senate Committee held a markup session on S. 1480. That bill, like the final version of section 101(14), defined CERCLA "hazardous substances" by incorporating substances that had been designated "hazardous" or "toxic" under a variety of other environmental statutes. In particular, subpart (C) incorporated wastes that had been designated as "hazardous" under RCRA. *See generally* S. 1480, 96th Cong., 2d Sess. (1980), *reprinted in Superfund* at 10.[9] During this session, Senator Bentsen introduced an amendment adding to the subpart (C) definition of "hazardous substance" the qualifier, "(but not including any waste, the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress)." Environment and Public Works Committee Mark Up Session on Toxic

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[9]The remaining subparts of section 101(14) incorporated materials designated "hazardous" or "toxic" as follows: subparts (A) and (D) incorporated sections 307 and 311 of the Clean Water Act; subpart (E) incorporated section 112 of the Clean Air Act; subpart (F) incorporated section 7 of the Toxic Substances Control Act; and subpart (B) provided a generic definition to capture materials designated as "hazardous" in the future.

Chemical Compensation, June 18, 1980, 96th Cong., 2d Sess. (1980). This qualifier thereby incorporated in CERCLA the RCRA exemption for Bevill wastes.

Significantly, the Committee Report accompanying S. 1480 explicitly rejected the notion, later entertained by the courts, that Bevill wastes could be regulated as CERCLA "hazardous substances" notwithstanding the exclusion set forth in subpart (C), because they contain hazardous constituents:

> It should be noted that any substance or material for which regulation is specifically suspended by Act of Congress under the Solid Waste Disposal Act is excluded from designation as a hazardous substance for the purpose of S. 1480, *notwithstanding the presence in such substance of any hazardous or toxic chemical.*

S. Rep. No. 848, 96th Cong., 2d Sess. 28, *reprinted in Superfund* at 12 (emphasis added). Committee reports are the most authoritative source of legislative history because they "represent[] *the considered and collective understanding* of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 U.S. 168, 186 (1969) (emphasis added); *accord Thornburg v. Gingles*, 478 U.S. 30, 43-44 & nn.7-8 (1986); *Garcia v. United States*, 469 U.S. 70, 76 (1984).

D. The Ninth Circuit Improperly Deferred To The EPA's Interpretation Of Section 101(14).

The Ninth Circuit's deference to the EPA's interpretation of section 101(14), as an alternative basis for its holding, was flawed for two separate reasons -- one procedural, and one substantive. Procedurally, the Ninth Circuit failed meaningfully to consider the legislative history, discounting that history as the source of potential ambiguity, rather than a means to its resolution. Pursuant to well-settled authority, the Ninth Circuit should have attempted to determine congressional intent using "the traditional tools of statutory construction" before deferring to the EPA. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987). Those tools

include the statute's "words, structure and *history*." *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124 (1987) (emphasis added); *see INS*, 480 U.S. at 446. Yet, the Ninth Circuit failed even to address the Senate Committee Report. Because the legislative history clearly establishes Congress' intention to exclude Bevill wastes from CERCLA regulation, notwithstanding their hazardous constituents, the Ninth Circuit's deference to the EPA's contrary interpretation was both premature and erroneous. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984); *INS*, 480 U.S. at 421.

Substantively, even if the legislative history were not dispositive here, deference to the EPA's interpretation of section 101(14) would be inappropriate because the interpretation now advanced by the EPA contradicts the position that the EPA took in 1982-83, immediately after the Bevill Amendment was incorporated into CERCLA. During the congressional hearings on Superfund, several representatives of the EPA, including its then-acting administrator, testified that (1) the language and structure of section 101(14) are susceptible to more than one interpretation; (2) any interpretation limiting the CERCLA exemption for Bevill wastes to subparagraph (C) would effectively nullify the exemption, because all such wastes contain constituents that would be deemed "hazardous" under the remaining subparts of the section; (3) Congress intended to exempt Bevill wastes from CERCLA regulation altogether, notwithstanding the presence of hazardous constituents; and (4) that conclusion is powerfully supported by the legislative history. *EPA: Investigation of Superfund and Agency Abuses (Part 2) Hearings Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 158-161 (1983); *see also United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1557-1558 (1992). Given these prior positions, the EPA's present view is entitled to little or no deference. *See Watt v. Alaska*, 451 U.S. 259, 273 (1981). Indeed, the EPA's earlier and

contemporaneous view, if anything, is entitled to greater weight. *NLRB*, 484 U.S. at 124 n.20.

E. The Question Presented Is An Important One With Far-Reaching Implications For The Industries Affected.

The issue presented here is of pressing concern, not only to the parties but to several industries. By its express terms, the Bevill Amendment applies to a wide range of mining and mineral processing wastes and by-products, certain utility wastes, and cement kiln dust. All of these materials share a common characteristic: they are by necessity created in large volumes, but pose very little threat to the environment. They are, in the EPA's words, "high volume, low hazard" wastes.[10]

CERCLA imposes unique burdens on those falling within its reach. All parties potentially responsible for the disposal of a "hazardous substance" are strictly liable, on a joint and several basis, for the costs of removal and remediation. 42 U.S.C. § 9607. In imposing such costs, Congress relied on the common law notion that those who knowingly engage in ultrahazardous activities must be held strictly liable for the consequences. At the same time, Congress expressly excluded "high volume/low hazard" Bevill wastes from CERCLA's strict joint-and-several liability regime. The Ninth Circuit's decision upsets this determination, and threatens serious adverse consequences for the affected industries.

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[10]For example, since 1910, the mining industry has generated 50 million metric tons of waste annually, only 5% of which tests as "hazardous" under EPA standards. EPA, *Report to Congress, Wastes from the Extraction and Beneficiation of Metallic Ores, Phosphate Rock, Asbestos, Overburden from Uranium Mining, and Oil Shale* at ES-12 (1985).

Significantly, honoring Congress' decision to exclude Bevill wastes from CERCLA regulation, notwithstanding their hazardous constituents, does not threaten environmental interests. First, in 1991, the EPA published its Regulatory Determination and Final Rule for Special Wastes From Mineral Processing ("Final Regulatory Determination"), permanently exempting copper smelting slag -- together with 19 other mineral processing wastes -- from regulation as a "hazardous waste" under Subtitle C of RCRA. 56 Fed. Reg. 27,300, 27,307 (1991).[11] The EPA's Final Regulatory Determination thus confirms what Congress understood when it passed the Bevill Amendment and incorporated the exclusion for Bevill wastes in CERCLA: copper smelting slag should not be regulated as a CERCLA "hazardous substance."

Second, under CERCLA, the EPA has substantial legal authority and financial resources to respond to releases of "pollutants and contaminants" -- even if they fall outside the statute's definition of "hazardous substances."[12] 42 U.S.C. §§ 9604(a)(1)(B), 9605, 9611(a). Finally, Bevill wastes

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[11]All other mineral processing wastes were deleted from the Bevill exemption, 40 C.F.R. § 261.4(b)(7), and are therefore subject to regulation as "hazardous" materials under both RCRA and CERCLA.

[12]"'Pollutant or contaminant' is broadly defined in section 101(33)" to include "basically, any substance which may reasonably be anticipated to cause harm to the environment." *Eagle-Picher Indus., Inc. v. United States EPA*, 759 F.2d, 922, 931 (D.C. Cir. 1985); *see* 42 U.S.C. § 9601(33). The definition contains no exemption for Bevill wastes. Hazardous constituents of Bevill wastes released into the environment are "pollutants or contaminants" within the meaning of CERCLA section 101(33), 42 U.S.C. § 9601(33). *Eagle-Picher*, 759 F.2d at 933.

continue to be regulated under "other applicable provisions of Federal or State law ... ." 42 U.S.C. § 6921(b)(3)(A).

II. CERCLA "Arrange For Disposal" Liability

The Ninth Circuit's resolution of the second question presented -- whether CERCLA "waste disposal" liability can be imposed for the good faith sale of an industrial by-product, which turns out to be defective for its intended use -- cannot be reconciled with the statutory provisions governing such liability, conflicts with the D.C. Circuit's decision in *American Mining Congress v. United States EPA*, 824 F.2d 1177 (D.C. Cir. 1987), contributes to the significant confusion currently reigning in the federal judiciary over the meaning of the CERCLA phrase "arrange for disposal," and seriously undermines important congressional policies designed to encourage the recycling of materials with hazardous constituents.

CERCLA section 101(29) defines "disposal" by incorporating the RCRA definition of that term. 42 U.S.C. § 9601(29). "Disposal" is defined in RCRA as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land ... ." 42 U.S.C. § 6903(3). "Solid waste," in turn, is defined as "garbage, refuse, ... and other *discarded* material." 42 U.S.C. § 6903(27) (emphasis added).[13]

By incorporating RCRA's carefully limited definitions of "disposal" and "solid waste," Congress sought to insure that CERCLA "waste disposal" liability would attach only to the "affirmative act of discarding" a substance as "waste," and not to the "productive use" of that substance. *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1361-62 (9th Cir. 1990). Here, the jury found by special verdict that

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[13]"Hazardous waste" is a subset of "solid waste," and is comprised of wastes that are hazardous to human health or the environment. 42 U.S.C. § 6903(5).

Asarco's slag was a "product" for purposes of the WPLA, possessing "intrinsic value" and having been "produced for introduction into trade or commerce." The jury also found Asarco liable under the WPLA for selling a defective product. Nonetheless, the district court imposed CERCLA "waste disposal" liability on Asarco.

Implicitly recognizing the serious Seventh Amendment problems inherent in the district court's treatment of this issue, the Ninth Circuit affirmed the district court's holding, but on different grounds. In so doing, the court fashioned a new rule for CERCLA "waste disposal" liability, holding that the "productive use" test applies only to "principal business products," and not to "by-products." This rule finds no basis in the statutory definitions that dictate the "productive use" test, directly conflicts with the D.C. Circuit's decision in *American Mining*, and does violence to the statutory limits on CERCLA "waste disposal" liability that Congress has imposed.

In *American Mining*, the court dealt conclusively with the status of recycled by-products under RCRA (and hence under CERCLA), holding that the EPA's regulatory authority under RCRA is limited to materials that are actually "discarded, disposed of, thrown away, or abandoned." *Id.* at 1190. The court concluded that Congress purposefully chose to limit the EPA's authority, in order to encourage national recycling activities. In a subsequent decision, the D.C. Circuit held that these statutory definitions create a jurisdictional bar to the EPA's regulation of recycled industrial by-products.

The Ninth Circuit's decision here, which is premised on the conclusion that by-products inherently are "wastes," regardless of their subsequent use, stands in direct conflict with these decisions from the D.C. Circuit, and the statutory definitions on which they are premised. Indeed, following the Ninth Circuit's decision, a different panel of that court, concerned about the viability of *Asarco's* attempted distinction between "principal business products" and "by-products,"

sought to limit that holding to circumstances where the by-products are recycled in their "identical state," rather than being "reprocessed." This further distinction, like the one announced in *Asarco* itself, is simply detached from any statutory mooring.

It is critical that the rules governing CERCLA "arrange for disposal" liability be clearly articulated if Congress' goal of encouraging the recycling and reuse of products *and* by-products is to be realized. Indeed, a recent decision from the United States Court of Appeals for the Fourth Circuit, *Owen Electric Steel Co. v. Browner*, No. 93-2195, 1994 WL 554656 (4th Cir. Oct. 12, 1994), suggests yet *another* test for CERCLA "waste disposal" liability, further underscoring the degree of confusion surrounding this issue, and the need for guidance by this Court.

A. The Ninth Circuit's Decision Cannot Be Reconciled With The Statutory Scheme Governing "Waste Disposal" Liability.

Numerous courts, including the Ninth Circuit, have expressly recognized that CERCLA "waste disposal" liability requires the release of a "solid waste" as defined under RCRA, and thus *"refer[s] only to* an affirmative act of discarding a substance as waste, *and not to* the productive use of the substance." *Stevens Creek*, 915 F.2d at 1362 (emphasis added; citations omitted). Accordingly, courts have held that the sale of a "useful product" does not constitute an "arrangement for disposal." *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993); *accord AM Int'l, Inc. v. International Forging Equip. Corp.*, 982 F.2d 989, 999 (6th Cir. 1993); *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1381 (8th Cir. 1989). As these courts have recognized, the "productive use" test emanates from the statutory definitions themselves, which

reflect Congress' deliberate choice to limit CERCLA liability to instances of "waste disposal," as those terms are defined in RCRA. *Stevens Creek*, 915 F.2d at 1362.

On appeal, the Ninth Circuit rejected Asarco's argument that the jury's special "product" verdict under the WPLA, which was predicated on its finding that slag had been sold as a "useful product," precluded the imposition of CERCLA "waste disposal" liability. The Ninth Circuit distinguished the "productive use" cases on grounds that they "involved products that were produced as the producers' principal business products, *not by-products that the producers had to get rid of.*"[14] Pet. App. at B-22 n.6 (emphasis added).

The Ninth Circuit's purported distinction between "principal business products" and "by-products" as

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[14]In reaching this conclusion, the Ninth Circuit relied heavily on *United States v. A&F Materials Co.*, 582 F. Supp. 842 (S.D. Ill. 1984), and other older cases holding under then-existing regulations, that by-products constituted "waste" if they were "sometimes discarded." However, the Ninth Circuit's reliance on *A&F Materials*, and on the EPA's regulations implementing RCRA, was entirely ill-founded. First, the regulation relied on in *A&F Materials* was *amended* in 1985, and now provides that by-products "used or reused as effective substitutes for commercial products" are not solid wastes -- significantly, slag was used as a commercial substitute for gravel. 40 C.F.R. § 261.2(e)(ii), *as amended by* 50 Fed. Reg. 664 (1985). Second, and even more broadly, these regulations apply *only* to RCRA subtitle C "hazardous wastes," 40 C.F.R. § 261.1(b)(1) -- a fact that the EPA has expressly recognized. Hazardous Waste Management System; Definition of Solid Wastes, 50 Fed. Reg. 627 (1985). Indisputably, copper smelting slag is *not* a RCRA "hazardous waste." Final Regulatory Determination, 56 Fed. Reg. 27,300, 27,307 (1991).

determinative of CERCLA "waste disposal" liability simply cannot be reconciled with the "productive use" test, or the statutory definitions on which that test is premised. Under CERCLA, the controlling and only relevant inquiry is whether the material was "discarded" as a "waste" or put to a "productive use" -- a test that does not discriminate between "principal business products" and "by-products."

Significantly, while Asarco's final petition for rehearing and suggestion for rehearing *en banc* was pending before the Ninth Circuit, a different three-judge panel of that court issued an opinion, *Catellus Dev. Corp. v. United States*, 34 F.3d 748 (9th Cir. 1994), which recognizes the problems inherent in *Asarco's* attempted line-drawing, and seeks to limit *Asarco* by forging a new test. The *Catellus* court acknowledged, as Asarco had argued in its petition for rehearing, that *Asarco* could not, on its face, be reconciled with the applicable statutory provisions governing "waste disposal" liability, or with the Ninth Circuit's own recognition of the "productive use" test in *Stevens Creek*. *Id.* at 750 (quoting Pet. App. at B-22). The *Catellus* court therefore attempted to limit *Asarco* by finding that:

> *Asarco* did not consider whether a by-product that is intended for recycling should be classified as waste for the purpose of section 107(a)(3) liability. Rather, the facts [in *Asarco*] limited the scope of its statements to the situation where the by-product being sold will have to continue to be used in its *identical state* until it is disposed of.

Id. at 751 (emphasis added).

Under *Catellus'* suggested limitation of *Asarco*, unless a by-product is "re-processed" or sold for use in other than its "identical state, it is a solid waste." However, this additional distinction -- like *Asarco's* original distinction between "principal business products" and "by-products" -- is without foundation in the statutory definitions governing CERCLA "waste disposal" liability, has no relevance to the "productive

use" inquiry,[15] and potentially threatens a wide variety of current recycling activities.[16]

B. The Ninth Circuit's Decision Conflicts With The D.C. Circuit's Decision In *American Mining* And Adds To The Existing Confusion Regarding "Arrange For Disposal" Liability Under CERCLA.

In *American Mining*, the D.C. Circuit held that the EPA lacked RCRA authority to regulate by-products "that are

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[15]It should be noted that *Catellus'* attempt to limit *Asarco* to circumstances where the by-product has been sold in its "identical state" is without factual basis in the *Asarco* record. All of the slag at issue in this case was, in fact, processed before being sold. Pet. App. at B-13. Furthermore, the EPA regulations upon which the *Catellus* court relied, do not support the distinction between materials recycled in their "identical state," and those that are "reprocessed." Rather, the EPA broadly exempts from its "solid waste" definition *both* by-products "used or reused as ingredients in an industrial process to make a product," *and* by-products "used or reused as effective substitutes for commercial products." 40 C.F.R. § 261.2(e)(i) and (ii).

[16]For example, there are, at present, a significant number of metals, classified as hazardous substances, that are extensively recycled in the United States. *See* Staff, Div. of Mineral Comm., *Recycled Metals In the United States* vi (U.S. Dep't Int., Bureau of Mines 1993). Under *Catellus*, transferring those metals to a recycling facility may subject the transferor to CERCLA "waste disposal" liability, unless they are reprocessed into a new material, rather than utilized in their "identical state" as secondary metals. Other materials recycled in their identical state, such as off-specification chemical products, which are currently exempt from RCRA regulation, 40 C.F.R. § 261.33, also may now be subject to CERCLA under *Catellus*.

recycled and reused in an ongoing manufacturing or industrial process." 824 F.2d at 1186 (emphasis added). In so holding, the court focused on the fact that such materials -- although not the primary object of manufacture -- were neither "disposed of" nor "discarded," and therefore did not meet the definition of "solid waste" upon which RCRA jurisdiction turns. *Id.* at 1185. The court rejected the EPA's argument that in RCRA, Congress had employed the concept of "waste" in an open-ended manner that embraced materials not technically "discarded, disposed of, thrown away, or abandoned." *Id.* at 1190. Rather, the court found that "RCRA was enacted ... in an effort to help States deal with the ever-increasing problem of solid waste *disposal* by encouraging the search for and use of alternatives to existing methods of disposal (including recycling) ... ." *Id.* at 1185-86. The court found, therefore, that materials "*destined for beneficial reuse or recycling*" may not be regulated as solid wastes by the EPA because they "have not yet become part of the waste disposal problem." *Id.* at 1186.[17] Under *American Mining*, a by-product cannot be considered to have been "disposed of" for CERCLA purposes if it has been

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[17]In a later decision, the D.C. Circuit described these limitations as a "jurisdictional bar" against the regulation of "non-discarded" materials. *Steel Mfrs. Ass'n v. EPA*, 27 F.3d 642, 646 (D.C. Cir. 1994).

recycled and put to a "productive use."[18] *Asarco* is fundamentally irreconcilable with that decision.

Recently, the Fourth Circuit added yet another approach to the "by-product-as-waste" issue in *Owen Electric Steel Co. v. Browner*, No. 93-2195, 1994 WL 554656 (4th Cir. Oct. 12, 1994). Owen recycled and sold slag -- a by-product of its steel production -- to the construction industry for use as aggregate in roadbeds. Before it was sold, however, the slag was stored on the ground for up to six months. *Id.* at *4. Purporting to rely on *American Mining* and subsequent case law, the Fourth Circuit concluded that "the fundamental inquiry in determining whether a byproduct has been 'discarded' is whether the byproduct is immediately recycled for use in the same industry"; the court found that slag, stored for ultimate sale to others as aggregate, was therefore "discarded material." *Id.* Thus, under *Owen*, the sale of a by-product can be regulated as a "waste disposal," unless the by-product is (i) immediately recycled, (ii) for use in the same industry. As with *Asarco* and *Catellus*, the statutory definitions governing CERCLA "waste disposal" liability provide no foundation for the *Owen* holding.

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[18]This conclusion is not altered by the fact that the by-product turns out to be defective for its intended use. Absent proof that the seller has employed a "deceptive guise" to dispose of a hazardous substance in order to escape "waste disposal" liability, *see Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059 (5th Cir. 1990), it is improper to superimpose CERCLA "waste disposal" liability on the sale of products *or* by-products, even if they turn out to be defective; such transactions remain the exclusive province of state products liability laws and common law remedies. Neither the district court nor the Ninth Circuit analyzed this as a "deceptive guise" case, nor made any such finding.

Asarco, *Catellus*, and *Owen* simply add to the existing confusion regarding the meaning of the CERCLA phrase "arrange for disposal," which already permeates the federal judiciary. *See* Roger K. Ferland & Marilyn D. Cage, *Using RCRA to Interpret CERCLA Liability: What is "Arranging for Disposal"?*, 23 Ariz. St. L.J. 445, 461 (1991) (noting that "courts have been unsuccessful in devising a consistent or coherent interpretation of CERCLA liability based solely on the language of section 107(a)(3)," and that at least six divergent lines of authority have evolved, most of which do not refer to the applicable statutory definitions). This case presents a timely and important opportunity for this Court to provide much-needed guidance regarding the meaning of this phrase, and CERCLA's application to recycled materials.

C. The Ninth Circuit's Decision Seriously Undermines Important Congressional Policies Favoring Recycling.

The importance of recycling is emphasized throughout RCRA, and by extension, in CERCLA. In enacting RCRA, Congress found that millions of tons of recoverable materials are disposed of each year as waste, and that these materials, if recovered and resold, could help reduce the national deficit. 42 U.S.C. § 6901(c). RCRA therefore established a national policy of resource recovery that was to be implemented "by encouraging ... materials recovery [and] properly conducted recycling and reuse ... ." 42 U.S.C. § 6902(a)(6); *see also American Mining*, 824 F.2d at 1185 (recounting RCRA's legislative history). The Ninth Circuit's decision seriously undermines these policies by subjecting good faith recycling efforts to CERCLA's strict joint-and-several liability regime -- in clear derogation of Congress' carefully chosen limitations on such liability.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and Opinion of the Ninth Circuit.

Respectfully submitted this 7th day of November, 1994.

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